Every case must plainly be determined upon the particular circumstances affecting that case, though, it is of course, true to say that as a matter of human sense an infant is better with its mother and needs a mother's care. In this case unhappily the mother left the child when he was 9 days old.

The mother's attitude to the child seems to me, as is with the magistrate, to have been very different.

The magistrate was satisfied that the mother has never shown and has never had the slightest interest in this infant apart from giving him some presents.

It is clear that the first and paramount consideration is the welfare of the child, to which all other considerations are subordinate. These subordinate considerations include the mother's wishes and the fact that she is the natural mother. See the Court of Appeal decision in *Re C. (M.A.) (an infant*[2]) and *Thomas John Barnardo* v. *Margaret McHugh*[3] where Lord Herschell in the course of his judgment said at page 399:

"I think this case determine (and I concur in the decision) that the desire of the mother of an illegitimate child as to its custody is primarily to be considered. Of course, if it can be shown that it would be detrimental to the interest of the child that it should be delivered to the custody of the mother or of any person in whose custody she desires it to be, the court, exercising its jurisdiction. as it always does in such a case, with a view to the benefit of the child, would not feel bound to accede to the wishes of the mother."

The fact that change of custody may unsettle the mind of the infant is only a circumstance to be considered and ought not to be regarded as a complete bar to any change.

There can be no doubt on the evidence that the foster parents have lavished loving care and affection on the infant.

If the infant were taken away from the foster parents after such a length of time the result might be that he would develop a permanent emotional scar.

The court below is right when it says it is not possible to forecast with any certainty what the future would hold for him in Australia, and he would be in a completely alien environment.

I have to bear in mind that the court below has seen the witnesses including the infant and has given findings of fact which depend on its having seen the witnesses and assessed by that means to some extent the reliability of the evidence given. I quote the finding of the learned magistrate at page 42 of the judgment:

"Indeed, among other reasons, the applicant have not in the past shown much love for her natural son. She abandoned it to the care of other people.

The child is now attached to the respondents. He is not attached to the applicant.

The applicant may now harbour feelings of remorse and even guilt over the child but I am afraid it is too late now. The court is primarily concerned with the welfare of the child, not with the welfare of the parties to this case."

There can be no doubt whatever that the question was pre-eminently one which depended on the exercise of the magistrate of his discretion and the appellate court would not interfere unless satisfied that the discretion had been wrongly exercised or that some principle had been neglected by the lower court or that there was some other defect. In the present case I am satisfied that the magistrate had exercised his discretion rightly.

A child's future happiness and sense of security are always important factors and the effect of a change of custody will often be worthy of the close and anxious attention which they undoubtedly received in this case.

There is in my view no substance in the other matters raised on the appeal.

For these reasons, as well as for the reasons which appear in the very careful judgment of the lower court, it appears to me that this appeal fails and that the judgment of the learned magistrate must be affirmed and the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Yong & Wong; Battenberg & Talma.*

TAN MOOI LIANG v. LIM SOON SENG & ORS.

[F.C. (Azmi L.P., Suffian C.J. and Ong Hock Sim F.J.) April 20, 1974]

[Kuala Lumpur — Federal Court Civil Appeal No. 72 of 1973]

Partnership — Notice by one partner of intention to dissolve the partnership — Whether English law applies — Other provisions made by written law — Contracts (Malay States) Ordinance, 1950, Chapter X, ss. 192-219 — Civil Law Act, 1956, s. 5(1).

In this case the appellant and the four respondents were partners in the business of dealers and distributors in sundry goods. The appellant gave notice of his intention "to dissolve the partnership" and subsequently applied for the order that the partnership be wound up, the taking of accounts and the appointment of a receiver. The respondents pleaded that the notice given by the appellant was ineffective to dissolve the partnership and that it amounted to a notice of intention to retire from the partnership. The appellant applied by motion for the appointment of a receiver and manager. The learned trial judge dismissed the motion and the appellant appealed to the Federal Court.

Held (Suffian C.J. and Ong F.J., Azmi L.P. dissenting) dismissing the appeal: (1) there is no provision in the Contracts (Malay States) Ordinance, 1950, whereby a partner may dissolve a partnership by giving notice of his intention to dissolve it;

(2) because of the many provisions relating to partnership in the Contracts (Malay States) Ordinance, 1950, which constitute "other provisions relating to partnership", section 5(1) of the Civil Law Act, 1956 does not apply and therefore the English law of partnership did not apply in this case.

Cases referred to:-

(1) *Crayshaw* v. *Maule* 1 Swanst. 508; 36 E.R. 483.

(2) *Sathappa Chetty* v. *Subramanyan Chetty* A.I.R. 1927 P.C. 70.

(3) *Terunnanse* v. *Terunnanse* [1968] A.C. 1086.

(4) *Ting Tien Kwang & Ors.* v. *Kong Sung Seng & Ors.* [1964] M.L.J. 427.

FEDERAL COURT.

Chong Foo Seong for the appellant.

Leong Tuck Onn for the respondent.

Azmi L.P.: The plaintiff and the four defendants commenced a partnership in the business of dealers and distributors of sundry goods etc., on or about 1st July

1971. On 15th February 1973 the plaintiff gave notice of his intention, to quote his words "to dissolve the said partnership as from 15th February 1973." He thereafter brought this suit for a declaration that the partnership between him and the other defendants had been dissolved as from that date. He also prayed for (a) an order that the affairs of the said partnership should be wound up, (b) all necessary accounts and enquiries to be taken and made and (c) a receiver be appointed.

The defendants in their statement of defence stated that from 1st April 1956 to 1st July 1971 the first defendant was carrying on the said business in partnership with one Goh Peng Lang (f). On 30th June 1971, the said Goh Peng Lang retired and on the next day the plaintiff, third and fourth defendants and also the second defendant became the incoming partners. They admitted that they had received a letter dated 14th February 1973 from the plaintiff's solicitors giving notice to dissolve the partnership with effect from 15th February 1973.

The defendants said that the plaintiff was not entitled to terminate the partnership by the said notice and that the said notice was null, void and of no legal effect. Alternatively they said that the notice was unreasonable, vindictive and was given as a result of an unanimous resolution of the partners at a partnership meeting held on 7th February 1973 which removed the plaintiff as cashier of the partnership. At that meeting though all the defendants were present the plaintiff was absent although notice of the meeting was served on him. They maintained that the said notice of 15th February in effect amounted to a notice of intention to retire from the said partnership. They therefore prayed that the plaintiff's action be dismissed and for a declaration that the plaintiff had given notice of intention to retire from the partnership as from 15th February 1973.

On 17th March 1973, the plaintiff moved the court for an order that a receiver and manager be appointed to collect and receive the debts due to the partnership and other assets belonging to the partnership and to manage the same and that also the defendants forthwith deliver to the said receiver and manager all books etc.

In his affidavit in support of his motion plaintiff set out the facts alleged by him in his statement of claim. He also averred that on the dissolution of the partnership he was entitled to request for the appointment of a manager and receiver for purposes mentioned in his motion.

The first defendant in his affidavit admitted the facts stated in the statement of claim but maintained that the plaintiff had no power to terminate the said partnership business by a notice of dissolution.

The learned judge dismissed plaintiff's motion with costs. He expressed the view that there is no provision in the Contracts (Malay States) Ordinance as there is in the English Partnership Act of 1890 and in the Indian Partnership Act of 1932 whereby a member of a partnership may dissolve such a partnership by giving notice of his intention to dissolve. He went further to say that to dissolve such a partnership the plaintiff has to bring himself within the ambit of section 207 of the Contracts Ordinance. That section corresponds to section 254 of the Indian Contract Act of 1872.

Both under the English Partnership Act of 1890 (sections 26 and 32) and the Indian Partnership Act 1932 (section 43) any member of a partnership, the duration of which is indefinite, has a right, subject to any agreement between the partners to dissolve it at any time he pleases. Such notice, however, must, to be effectual, be explicit and be communicated to all the partners. (section 26(1) of the Partnership Act 1890).

Section 206 of our Contracts Ordinance provides: —

"206. In the absence of any contract to the contrary the relations of partners to each other are determined by the following rules: —

... ...

(g) if, from any cause whatsoever, any member of a partnership ceases to be so, the partnership is dissolved as between all the other members;

(h) unless the partnership has been entered into for a fixed term any partner may retire from it at any time".

It was because of the provision in paragraph (h) that it was argued on behalf of the defendants that the notice given by the plaintiff of intention to dissolve the partnership merely amounted to notice to retire from it with the result that the partnership itself has not been thereby dissolved.

It was, however, argued on behalf of the plaintiff that the law in England in respect of this matter should be applied to this case by virtue of section 5 of the Civil Law Ordinance 1956. Section 5(1) of the Ordinance provides that in all questions or issues which arise or which have to be decided with respect to the law of partnership, the law to be administered should be the same as would be administered in England in a like case on the passing of this Ordinance (on 17th April 1956), if such question or issue had arisen or had to be decided unless in any case, other provision is or shall be made under any written law.

The question we have to decide is whether a partner in the absence of any contract to the contrary dissolves a partnership by giving notice of intention to dissolve it. In other words, whether the English law on that point is applicable to Malaysia. There is no doubt that that was the common law of England before the passing of the Partnership Act of 1890. In 1819 Lord Eldon in *Crayshaw* v. *Maule*[1] stated:

"The general rules of partnership are well settled. Where no term is expressly limited for its duration and there is nothing in the contract to fix it, the partnership may be terminated by a moment's notice by either party. By that notice the partnership is dissolved, to this extent that the court will compel the parties to act as partners in a partnership existing only for the purpose of winding up affairs. So death terminates a partnership, and notice is no more than notice of the fact that death has terminated it."

Chapter X (of Partnership) of our Contracts Ordinance 1950 is in *pari materia* with the repealed Chapter XI (of Partnership) of the Indian Contract Act of 1872.

The Privy Council in *Sathappa Chetty* v. *Subramanyan Chetty*[2] appears to lay down the same principle in India when the Indian Chapter XI was still

in force. It that case the plaintiff was a partner in a banking and moneylending business. On 6th March 1917 he instituted a suit against his other partners, claiming a dissolution of partnership and accounts and consequential relief including the appointment of a receiver to get in such assets, if any, as were still outstanding. Lord Phillimore at page 71 stated: —

"In the view of the subordinate judge this partnership had been dissolved considerably more than three years before the date of the institution of the present suit. In their Lordships' view this was not so; in their view there never had been any dissolution until the plaintiff, by the present suit, by his writ and plaint claiming dissolution, intimated his will to dissolve which of itself is enough to put an end to a partnership at will."

The headnote of the law report in reference to this part of the judgment states:

"(b) Contract Act section 253 — Dissolution filing plaint in a suit by one partner is enough of itself to put an end to a partnership at will."

I would, however, with respect to the learned editors, read from their lordships' judgment that it was not so much the filing of the suit that dissolved the partnership but the intimation of the plaintiff of his will to dissolve which had put an end to the partnership. In any case if in the present case the partnership had not been dissolved by reason of the notice, it would have been dissolved when the plaintiff filed his suit claiming dissolution on 23rd February 1973.

In my view section 5 of the Civil Law Ordinance of 1956 should be interpreted in the same manner as the Privy Council had interpreted section 116 of the Evidence Ordinance of Ceylon in *Terunnanse* v. *Terunnanse*[3] 1086. At page 1092 their Lordships stated: —

"It is therefore in their Lordships' opinion legitimate, when applying section 116 to consult and give effect to the English cases, even if they appear to go further than the language of the section; and specific authority for so doing is given by section 100 of the Ordinance which provides that whenever in a judicial proceeding a question of evidence arises not provided for by the Ordinance or not by any other law in force in Ceylon such question shall be determined in accordance with the English law of Evidence for the time being."

For the above reasons I would therefore say that this partnership was dissolved when the plaintiff gave notice of intention to dissolve it on 15th February 1973. I would therefore allow the appeal and subject to any subsequent agreement between the parties from the date of this judgment as to the terms of settlement between them a receiver be appointed for the purpose of winding up the partnership business. The parties should be given liberty to apply before the High Court for that purpose. The defendants will pay the costs here and in the court below.

Suffian C.J. (Malaya) (read by **Ong Hock Sim F.J.**): The question for decision in this appeal is whether a partnership for an indefinite period is automatically dissolved simply by one of the partners giving notice to the other partners of his intention to dissolve the partnership.

I have read the judgments in draft of both my Lord President and of my brother Ong, and with respect I agree with that of my brother Ong for the reasons stated in his judgment that the answer to the question is in the negative.

Because of the many provisions relating to partnership in the Contracts (Malay States) Ordinance, 1950, which in my opinion constitute "other provisions relating to partnership" within the meaning of the last few words in subsection (1) of section 5 of the Civil Law Ordinance, 1956, the English law of partnership does not apply to the matter in dispute here, and accordingly I would respectfully agree that this appeal be dismissed with costs.

Ong Hock Sim F.J.: I have read the judgment in draft of the Lord President. With great respect and diffidence, I disagree therewith.

The appellant appeals from the dismissal by Mr. Justice Raja Azlan Shah of his application for appointment of a receiver and manager of the partnership business of Ngian Huat Seng Kee between him and the four respondents. By an unanimous resolution at a meeting on February 7, 1973, the appellant was removed from his position as cashier. In retaliation, he sent a notice dated February 14, 1973 intimating his intention to dissolve the said partnership as from February 15, 1973. The preliminary issue which the learned judge considered necessary to decide, before the question of appointment of a Receiver and Manager can arise, is whether there has been a dissolution. He concurred with the judgment in *Ting Tien Kwang & ors.* v. *Kong Sung Seng & ors.*[4] with reference to sections 14 and 24 of the Partnership Ordinance (Sarawak Cap. 67), where the learned Chief Justice Singapore said:

"It is clear that under the Ordinance where there is no fixed period of time for the duration of the partnership a partner may retire at any time but *there is no provision anywhere in the Ordinance*, as there is in the English Partnership Act, whereby a partner may dissolve such a partnership by giving notice of his intention to dissolve it. We are urged to construe section 14 together with section 24 to give a partner a right to so dissolve a partnership. Section 14 merely gives the court power to dissolve a partnership at the suit of a partner on certain specific grounds and *this section does not specify notice of dissolution as a ground*. . . . The legislature has not provided for the dissolution of a partnership at will by the unilateral act of a partner *but has specifically provided for a partner retiring from a partnership at will*" (see section 11(g)).

Section 26(1) of the English Partnership Act provides that "Where no fixed term has been agreed upon for the duration of the partnership, any partner may determine the partnership at any time on giving notice of his intention so to do to all the other partners." This is in *pari materia* with section 43(1) of the Indian Partnership Act, 1932, to which the judge adverted in his judgment.

Before us, the appellant's counsel urged that section 206(g) and (h) would empower the court to make the order. I do not agree. Section 206 has this marginal note "Rules determining partners mutual relations, where no contract to contrary" and I quote the opening sentence and paragraphs (g) and (h):

"In the absence of any contracts to the contrary, *the relations of partners* to each other shall be determined by the following rules —

(g) if, from any cause whatsoever, any member ceases to be so, the partnership is dissolved as between all the other members;

(h) unless the partnership has been entered into for a fixed term, any partner may *retire* from it at any time;".

Section 206 is similar to section 24 of the English Act which is headed "Rules as to interests and duties of partners subject to special agreement: " and reads:

"The interests of partners in the partnership property and their rights and duties shall be determined, subject to any agreement express or implied between the partners by the following rules:-".

There is no provision therein identical with paragraphs (g) and (h). It should be noted that paragraph (g) uses the words "cease to be a partner from *any cause* whatsoever, the partnership is dissolved," and in my view a letter intimating an intention can be hardly termed a cause.

I am afraid I am unable to discover what cause could render a partner ceasing to be one, other than death which is stated in paragraph (j), except supervening illegality as in section 34, or where he has suffered his share in the partnership property to be charged for his separate debt (section 33(2) of the English Act) and insanity.

I will now deal with section 5(1) of the Civil Law Ordinance (No. 5 of 1956). It reads:

"5(1) In all questions or issues which arise or which have to be decided in the States of Johore, Kedah, Kelantan, Negeri Sembilan, Pahang, Perak, Perlis, Selangor and Trengganu with respect to the law of partnership.... the law to be administered shall be the same as would be administered in England in the like case at the date of the coming into force of this Ordinance, if such question or issue had arisen or had to be decided in England, *unless in any case other provision is or shall be made by any written law*".

In my view, Chapter X of the Contracts (Malay States) Ordinance (sections 192-219) is other provision made displacing resort to the English Partnership Act.

I am of opinion therefore that it would be wrong to say that the notice of intention to dissolve given by letter dated February 14, 1973 has the effect contended by appellant. I would affirm the judgment of the High Court in both the Motions.

I may add that it was not possible for the court to make an order in terms of the plaintiff's motion as no competent person was put forward for the appointment nor his consent obtained thereto.

I would dismiss the appeal with costs. The deposit will be paid out to respondents to account of their taxed costs.

Appeal dismissed.

Solicitors: *Jagjit Singh & Co.; K. K. Lam & Co.*

HO KEAN v. KONG LAI SOO

[F.C. (Ali, Ong Hock Sim and Raja Azlan Shah F.JJ.) April 25, 1974]

[Ipoh — Federal Court Civil Appeal No. 111 of 1973]

Landlord and Tenant — Action for recovery of premises — Whether premises used for illegal or immoral purposes — Allegation that son of tenant exposed his private parts with intention that landlord's daughter in another part of the premises could see them — Control of Rent Act, 1966, s. 16(1)(d).

Practice and Procedure — Appeal — Whether respondent can rely on ground not taken in lower court — Ground not pleaded.

The appellant was the tenant of controlled premises. One of his sons was convicted of criminal trespass. Another of his sons was convicted of indecent exposure of his private parts. Both these offences were committed at the above-said premises. The question before the court was whether the two sons were guilty of conduct of using the premises for illegal or immoral purposes to enable the landlord to apply for recovery of possession under section 16(1)(d) of the Control of Rent Act. The High Court answered this in the affirmative ([1973] 2 M.L.J. 150). At the hearing of the appeal, the landlord (respondent) sought to rely on a point not taken in the lower court, that is, that by the acts of the tenant's children, there was a nuisance or persistent annoyance to persons in the neighbourhood within the first limb of section 16(1)(d) of the Control of Rent Act, 1966. This point had not been pleaded.

Held, allowing the appeal: (1) the phrase "use for illegal or immoral purposes" necessarily implies a deliberate use, a designed choice of the thing used for the purpose in hand. There must be some link between the guilty act and the premises which are the subject matter of the proceedings for possession;

(2) applying this test to the present case, the landlord had not on the pleadings and on the facts established his case that the premises were used for an "illegal or immoral" purpose;

(3) the respondent was precluded from relying on a ground which had not been pleaded and which was not a live question to be decided.

Cases referred to:-

(1) *R. Schneiders & Sons Ltd.* v. *Abrahams* [1925] 1 K.B. 301, 305, 307.
(2) *Abraham* v. *Wilson* [1971] 2 W.L.R. 93.
(3) *Rugby School* v. *Tannahill* [1935] 1 Q.B. 87.
(4) *Hoffman* v. *Fineberg* [1948] All E.R. 1592.
(5) *Walles & Sons Ltd.* v. *Thomas* [1921] 1 K.B. 541.
(6) *Thomas* v. *Marconi's Wireless Telegraph Co. Ltd.* [1965] 1 W.L.R. 850.

FEDERAL COURT.

S. Theivanthiran for the appellant.

Soo Wai Sun for the respondent.

Raja Azlan Shah F.J.: This appeal raises a short point of some practical importance on the operation of the provisions of section 16(1)(d) of the Control of Rent Act, 1966.

The landlord claimed possession in the magistrate's court of the front portion of the ground floor of controlled premises which he had let to the tenant, relying on the second limb of section 16(1)(d) of the Act that the tenant's two sons "have been guilty of using the tenancy premises "for illegal or immoral purposes." (Paragraph 3 of statement of claim).

One of the tenant's sons had in fact been convicted in May 1966 of criminal trespass under section 447 of the Penal Code when he entered into a room on the said premises occupied by the two daughters of the